

COMMITTEE REPORT

MR. PRESIDENT:

The Senate Committee on Commerce and Consumer Affairs, to which was referred House Bill No. 1788, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

- 1 Page 2, delete lines 19 through 37.
- 2 Page 3, line 6, delete "Dick" and insert "**Richard D.**".
- 3 Page 3, line 30, delete "Dick" and insert "**Richard D.**".
- 4 Page 4, line 21, delete "Dick" and insert "**Richard D.**".
- 5 Page 7, line 3, delete "the following:" and insert "**every**".
- 6 Page 7, line 4, delete "(1) Every".
- 7 Page 7, run in lines 3 through 4.
- 8 Page 7, delete lines 5 through 6.
- 9 Page 7, line 18, delete ":".
- 10 Page 7, line 19, delete "(1)".
- 11 Page 7, line 19, delete "; or" and insert ".".
- 12 Page 7, run in lines 18 through 19.
- 13 Page 7, delete lines 20 through 21.
- 14 Page 8, line 2, delete ":".
- 15 Page 8, line 3, delete "(1)".
- 16 Page 8, line 3, delete "; or" and insert ".".
- 17 Page 8, run in lines 2 through 3.
- 18 Page 8, delete lines 4 through 5.
- 19 Page 8, between lines 11 and 12, begin a new paragraph and insert:
- 20 "SECTION 8. IC 24-3-2-14 IS ADDED TO THE INDIANA CODE

AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 14. (a) Subject to subsection (c), a cigarette retailer may enter into an agreement concerning, and participate in, a cigarette manufacturer's merchandising, advertising, display, or consumer discount or promotional program in which the retailer:**

(1) provides cigarette merchandising, advertising, shelf space, stocking, or display to the manufacturer;

(2) conducts the manufacturer's consumer promotion and discount programs and provides the promotions and discounts to customers; and

(3) is paid or compensated by the manufacturer for performing the manufacturer's program.

(b) Subject to subsection (c), a cigarette manufacturer may:

(1) enter into an agreement with a retailer concerning the manufacturer's program;

(2) provide a retailer with a monetary payment or other compensation for participating in the manufacturer's program; and

(3) provide consumer promotions and discounts to a retailer for the retailer to furnish to consumers.

(c) A cigarette manufacturer may not, directly or indirectly, do the following:

(1) Require the retailer to take certain actions concerning another manufacturer's products as a condition for the retailer to participate in a consumer or product promotion, or to receive a consumer cigarette price discount, or any compensation, rebate, or other inducement relating to the promotion. However, the manufacturer may require the retailer to provide the promotion or discount to consumers and advertise and display the promotion and the promoted or discounted product to consumers.

(2) Require a retailer to allocate to the manufacturer more than the lesser of:

(A) the percentage of the manufacturer's Indiana market share in the most recent calendar year; or

(B) fifty percent (50%);

of the retailer's merchandising, stocking, display, shelf, or advertising space if the manufacturer has more than fifteen

percent (15%) of the Indiana market for the most recent calendar year.

(3) Prevent, restrict, or limit a retailer from stocking, displaying, advertising, or participating in a program of another manufacturer.

(4) Prevent, restrict, or limit a retailer from determining the size or location of the space that the retailer uses to stock, display, promote, or advertise cigarettes.

(5) Require the retailer to raise its prices on, or prevent a retailer from raising, reducing, setting, or retaining the price on, another manufacturer's products.

SECTION 9. IC 24-3-5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]:

Chapter 5. Master Settlement Agreement Protection Act

Sec. 1. As used in this chapter, "brand family" means cigarettes that are:

- (1) sold under the same trademark; and
- (2) differentiated from one another by means of modifiers such as menthol, lights, kings, or 100s.

The term includes the use of a brand name, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or other indicia of product identification that is identical or similar to or identifiable with a previously known brand of cigarettes.

Sec. 2. As used in this chapter, "cigarette" has the meaning set forth in IC 24-3-3-5.

Sec. 3. As used in this chapter, "department" means the department of state revenue.

Sec. 4. As used in this chapter, "distributor" means a person that:

- (1) purchases cigarettes on which the tax under IC 6-7-1 is not paid; and
- (2) stores, sells, or otherwise disposes of the cigarettes.

Sec. 5. As used in this chapter, "master settlement agreement" has the meaning set forth in IC 24-3-3-6.

Sec. 6. As used in this chapter, "nonparticipating manufacturer" means a tobacco product manufacturer that is not a participating manufacturer.

1 **Sec. 7. As used in this chapter, "participating manufacturer"**
 2 **has the meaning set forth in IC 24-3-3-12(1).**

3 **Sec. 8. As used in this chapter, "qualified escrow fund" has the**
 4 **meaning set forth in IC 24-3-3-7.**

5 **Sec. 9. As used in this chapter, "stamping agent" means a**
 6 **person that may affix a stamp to a package of cigarettes under**
 7 **IC 6-7-1-15.**

8 **Sec. 10. As used in this chapter, "tobacco product**
 9 **manufacturer" has the meaning set forth in IC 24-3-3-10.**

10 **Sec. 11. As used in this chapter, "units sold" has the meaning set**
 11 **forth in IC 24-3-3-11.**

12 **Sec. 12. (a) Not later than April 30 of each year, a tobacco**
 13 **product manufacturer whose cigarettes are sold in Indiana,**
 14 **whether directly or through a distributor, retailer, or similar**
 15 **intermediary or intermediaries, shall certify to the department and**
 16 **the attorney general that, as of the date of the certification, the**
 17 **tobacco product manufacturer is:**

18 **(1) a participating manufacturer; or**

19 **(2) in full compliance with IC 24-3-3.**

20 **The department shall prescribe the form of the certification.**

21 **(b) A participating manufacturer shall include in a certification**
 22 **under subsection (a) a list of the participating manufacturer's**
 23 **brand families. The participating manufacturer shall update the**
 24 **list by filing a supplemental certification with the department and**
 25 **the attorney general not less than thirty (30) days before the**
 26 **participating manufacturer adds a brand family or otherwise**
 27 **modifies the list of brand families.**

28 **(c) A nonparticipating manufacturer shall include in a**
 29 **certification under subsection (a) a list of the nonparticipating**
 30 **manufacturer's brand families, including the following:**

31 **(1) A separate listing of each brand family that was sold in**
 32 **Indiana during the calendar year before the year in which the**
 33 **certification is filed.**

34 **(2) A separate listing of the number of units sold for each**
 35 **brand family that was sold in Indiana during the calendar**
 36 **year before the year in which the certification is filed.**

37 **(3) An indication of any brand family that was sold in Indiana**
 38 **during the calendar year before the year in which the**

1 certification is filed and that is not sold in Indiana as of the
2 date of the certification.

3 (4) The name and address of any other manufacturer of a
4 brand family that was sold in Indiana during the calendar
5 year before the year in which the certification is filed.

6 (d) A nonparticipating manufacturer shall file a supplemental
7 certification with the attorney general not less than thirty (30) days
8 before the nonparticipating manufacturer adds to or otherwise
9 modifies its list of brand families.

10 (e) A nonparticipating manufacturer shall certify the following
11 in a certification under subsection (a):

12 (1) The nonparticipating manufacturer:

13 (A) is registered to do business in Indiana; or

14 (B) has appointed an agent for service of process and
15 provided notice under section 15 of this chapter.

16 (2) The nonparticipating manufacturer has:

17 (A) established and continues to maintain a qualified
18 escrow fund; and

19 (B) executed a qualified escrow agreement that:

20 (i) the attorney general has approved; and

21 (ii) governs the qualified escrow fund.

22 (3) The nonparticipating manufacturer is in full compliance
23 with:

24 (A) this section; and

25 (B) IC 24-3-3.

26 (4) The name, address, and telephone number of the financial
27 institution that holds the nonparticipating manufacturer's
28 qualified escrow fund.

29 (5) The account number and any subaccount numbers of the
30 nonparticipating manufacturer's qualified escrow fund.

31 (6) The amounts and dates of deposits that the
32 nonparticipating manufacturer placed in the qualified escrow
33 fund for cigarettes sold in Indiana during the calendar year
34 before the year in which the certification is filed, including
35 any verification required by the attorney general.

36 (7) The amounts and dates of withdrawals or transfers of
37 funds that the nonparticipating manufacturer made from a
38 qualified escrow fund into which the nonparticipating

1 manufacturer made or makes escrow payments under
2 IC 24-3-3.

3 (f) A tobacco product manufacturer shall not include a brand
4 family in the tobacco product manufacturer's certification under
5 subsection (a) unless:

6 (1) in the case of a participating manufacturer, the
7 participating manufacturer affirms that the brand family is
8 considered the participating manufacturer's cigarettes for
9 purposes of calculating the participating manufacturer's
10 payments under the master settlement agreement for the year
11 in which the certification is filed in the volume and shares
12 determined under the master settlement agreement; or

13 (2) in the case of a nonparticipating manufacturer, the
14 nonparticipating manufacturer affirms that the brand family
15 is considered to be the nonparticipating manufacturer's
16 cigarettes for purposes of IC 24-3-3-12(2).

17 (g) This section does not limit or otherwise affect the state's
18 right to maintain that a brand family constitutes cigarettes of a
19 different tobacco product manufacturer for purposes of calculating
20 payments under the master settlement agreement or for purposes
21 of IC 24-3-3.

22 (h) A nonparticipating manufacturer shall maintain all invoices
23 and documentation of sales and any other relevant information for
24 a period of five (5) years unless otherwise required by law to
25 maintain the invoices, documentation of sales, or other relevant
26 information for more than five (5) years.

27 Sec. 13. (a) Not later than July 1 of each year, the attorney
28 general shall make available to the public by publishing on
29 accessIndiana (as defined in IC 5-21-1-1.5) a directory listing all
30 brand families listed in certifications filed under section 12 of this
31 chapter.

32 (b) A directory described in subsection (a) shall not include the
33 name or brand families of a nonparticipating manufacturer:

34 (1) that fails to comply with section 12 of this chapter; or
35 (2) whose certification fails to comply with section 12(c) or
36 12(e) of this chapter, unless the attorney general determines
37 that the failure has been remedied.

38 (c) The directory may not include a tobacco product

1 manufacturer or a brand family if the attorney general concludes
2 that:

3 (1) in the case of a nonparticipating manufacturer, all escrow
4 payments required under IC 24-3-3-12 for any period for any
5 brand family, whether or not listed by the nonparticipating
6 manufacturer, have not been fully paid into a qualified escrow
7 fund governed by a qualified escrow agreement that has been
8 approved by the attorney general; or

9 (2) all outstanding final judgments, including interest on the
10 judgments, for violations of IC 24-3-3 have not been fully
11 satisfied for the tobacco product manufacturer or brand
12 family.

13 (d) The attorney general shall update the directory as necessary
14 to correct mistakes or to add or remove a tobacco product
15 manufacturer or brand family to keep the directory in conformity
16 with the requirements of this chapter.

17 (e) A distributor or stamping agent shall provide and update as
18 necessary an electronic mail address to the attorney general for
19 purposes of receiving a notification required by this chapter.

20 **Sec. 14. A person may not:**

21 (1) affix a stamp to a package or other container of cigarettes;
22 or

23 (2) sell or offer or possess for sale in Indiana cigarettes;
24 of a tobacco product manufacturer or brand family that is not
25 listed in a directory under section 13 of this chapter.

26 **Sec. 15. (a)** A foreign nonparticipating manufacturer that has
27 not registered to do business in Indiana shall, as a condition
28 precedent to having the foreign nonparticipating manufacturer's
29 brand families listed in a directory under section 13 of this chapter,
30 appoint and engage without interruption the services of an agent
31 in the state to act as the foreign nonparticipating manufacturer's
32 agent for the service of process. Service on an agent under this
33 section constitutes legal and valid service of process on the foreign
34 nonparticipating manufacturer that appointed and engaged the
35 services of the agent. The foreign nonparticipating manufacturer
36 shall provide the following information to the department and the
37 attorney general:

38 (1) The name, address, and telephone number of the agent.

1 **(2) Proof of the appointment of the agent.**

2 **(3) The availability of the agent.**

3 **(4) Any other information required by the department or the**
 4 **attorney general.**

5 **(b) A foreign nonparticipating manufacturer shall provide**
 6 **notice to the department and the attorney general not less than**
 7 **thirty (30) days before the foreign nonparticipating manufacturer**
 8 **terminates the authority of an agent appointed under this section.**
 9 **The foreign nonparticipating manufacture shall provide proof to**
 10 **the satisfaction of the attorney general of the appointment of a new**
 11 **agent not less than five (5) days before the foreign nonparticipating**
 12 **manufacturer terminates an existing agency appointment.**

13 **(c) If an agent terminates an agency appointment, the foreign**
 14 **nonparticipating manufacturer shall:**

15 **(1) notify the department and the attorney general of the**
 16 **termination not more than five (5) days after the termination;**
 17 **and**

18 **(2) provide proof to the satisfaction of the attorney general of**
 19 **the appointment of a new agent.**

20 **(d) A foreign nonparticipating manufacturer that:**

21 **(1) sells products in Indiana; and**

22 **(2) has not appointed an agent under this section;**

23 **is considered to have appointed the secretary of state as the foreign**
 24 **nonparticipating manufacturer's agent. The appointment of the**
 25 **secretary of state under this subsection as the foreign**
 26 **nonparticipating manufacturer's agent does not satisfy the**
 27 **condition precedent to having the foreign nonparticipating**
 28 **manufacturer's brand families listed in a directory under section**
 29 **13 of this chapter.**

30 **Sec. 16. (a) This section applies after July 31, 2003.**

31 **(b) Not later than January 20, April 20, July 20, and October 20**
 32 **of a calendar year, a distributor or stamping agent shall submit the**
 33 **following information to the department and the attorney general:**

34 **(1) A list by brand family of the total number of cigarettes for**
 35 **which the distributor or stamping agent affixed stamps or**
 36 **otherwise paid taxes during the immediately preceding three**
 37 **(3) months.**

38 **(2) Any other information required by the department or the**

1 attorney general.

2 The distributor or stamping agent shall maintain and make
3 available to the department and the attorney general for a period
4 of five (5) years all invoices and documentation of sales of all
5 nonparticipating manufacturer cigarettes and any other
6 information that the distributor or stamping agent relied on in
7 reporting to the department and the attorney general.

8 (c) The attorney general may require a distributor or a tobacco
9 product manufacturer to submit additional information to
10 determine whether a tobacco product manufacturer is in
11 compliance with this chapter. The additional information may
12 include samples of the packaging or labeling of each of the tobacco
13 product manufacturer's brand families.

14 Sec. 17. The department shall disclose to the attorney general
15 any information received under this chapter and requested by the
16 attorney general for purposes of determining compliance with and
17 enforcing this chapter. The department and the attorney general:

18 (1) shall share with each other the information received under
19 this chapter; and

20 (2) may share the information received under this chapter
21 with other federal, state, or local agencies only for purposes
22 of enforcing this chapter or a corresponding law in another
23 state.

24 Sec. 18. The attorney general may require a nonparticipating
25 manufacturer to provide from the financial institution that holds
26 the nonparticipating manufacturer's qualified escrow fund for
27 purposes of complying with this chapter proof of:

28 (1) the amount of money in the qualified escrow fund being
29 held on behalf of the state;

30 (2) the dates of any deposits into the qualified escrow fund;
31 and

32 (3) the dates and amounts of any withdrawals from the
33 qualified escrow fund.

34 Sec. 19. The department or the attorney general may adopt
35 rules under IC 4-22-2 to implement this chapter, including rules to:

36 (1) require a tobacco product manufacturer subject to section
37 12(c) of this chapter to make required escrow deposits in
38 installments during the calendar year in which the sales

covered by the deposits are made; or

(2) produce information sufficient to enable the attorney general to determine the adequacy of the amount of an installment deposit described in subdivision (1).

Sec. 20. (a) This section applies in addition to or instead of any other civil or criminal penalty.

(b) The department may revoke or suspend the license of a distributor, a stamping agent, or any other person that violates section 14 of this chapter.

(c) Each:

(1) stamp affixed;

(2) sale of cigarettes; or

(3) offer or possession of cigarettes for sale;

in violation of section 14 of this chapter constitutes a separate violation.

(d) The department may impose a civil penalty that does not exceed the greater of:

(1) five hundred percent (500%) of the retail value of the cigarettes sold; or

(2) five thousand dollars (\$5,000);

for each violation of section 14 of this chapter.

Sec. 21. Whenever the department discovers any cigarettes that have been sold, offered for sale, or possessed for sale in Indiana in violation of section 14 of this chapter, the department may seize and take possession of the cigarettes. The seized cigarettes shall be forfeited to the state. The department shall destroy the seized cigarettes.

Sec. 22. The attorney general may seek an injunction to:

(1) restrain a threatened or an actual violation of section 14, 16(b), or 16(c) of this chapter by a stamping agent; and

(2) compel the stamping agent to comply with sections 14, 16(b), and 16(c) of this chapter.

Sec. 23. (a) A person shall not:

(1) sell or distribute; or

(2) acquire, hold, own, possess, transport, import, or cause to be imported;

cigarettes that the person knows or should know are intended for distribution or sale in Indiana in violation of section 14 of this

1 chapter.

2 (b) A person who violates this section commits a Class C
3 misdemeanor.

4 Sec. 24. A person who violates section 14 of this chapter engages
5 in an unfair and deceptive business practice.

6 Sec. 25. A determination by the attorney general to not list in or
7 to remove from a directory under section 13 of this chapter a
8 brand family or a tobacco product manufacturer is subject to
9 review only by the Marion County circuit court.

10 Sec. 26. The department shall not issue a registration certificate
11 under IC 6-7-1-16 to a distributor unless the distributor certifies in
12 writing that the distributor will comply with this chapter.

13 Sec. 27. In an action brought by the state to enforce this chapter,
14 the state may recover:

- 15 (1) the costs of investigation;
- 16 (2) expert witness fees;
- 17 (3) the costs of the action; and
- 18 (4) attorney's fees.

19 Sec. 28. If a court determines that a person has violated this
20 chapter, the court shall order any profits, gain, gross receipts, or
21 other benefit from the violation to be disgorged and paid to the
22 treasurer of state for deposit in the Indiana tobacco master
23 settlement agreement fund under IC 4-12-1-14.3.".

24 Page 9, line 13, delete "Dick" and insert "**Richard D.**".

25 Page 10, line 34, delete "Dick" and insert "**Richard D.**".

26 Page 11, line 24, delete "Dick" and insert "**Richard D.**".

27 Page 12, line 31, delete "Dick" and insert "**Richard D.**".

28 Page 13, line 19, delete "Dick" and insert "**Richard D.**".

29 Page 13, after line 20, begin a new paragraph and insert:

30 "SECTION 15. IC 35-46-1-11.8 IS ADDED TO THE INDIANA
31 CODE AS A NEW SECTION TO READ AS FOLLOWS
32 [EFFECTIVE JULY 1, 2003]: Sec. 11.8. (a) This section does not
33 apply to the following:

34 (1) A retail establishment that derives at least seventy-five
35 percent (75%) of the establishment's revenue from tobacco
36 and tobacco related products.

37 (2) A retail establishment that prohibits an individual who is
38 less than eighteen (18) years of age to enter the establishment.

1 (b) A retail establishment may not offer for sale or display
2 individual packages of cigarettes to which a customer is allowed
3 access without the assistance of an employee of the retail
4 establishment.

5 (c) A person who violates this section commits a Class C
6 infraction. Notwithstanding IC 34-28-5-4(c), a civil judgment for
7 an infraction committed under this section must be imposed as
8 follows:

9 (1) If the person has not been cited for a violation of this
10 section in the previous ninety (90) days, a civil penalty of fifty
11 dollars (\$50).

12 (2) If the person has had one (1) violation in the previous
13 ninety (90) days, a civil penalty of one hundred dollars (\$100).

14 (3) If the person has had two (2) violations in the previous
15 ninety (90) days, a civil penalty of two hundred fifty dollars
16 (\$250).

17 (4) If the person has had at least three (3) violations in the
18 previous ninety (90) days, a civil penalty of five hundred
19 dollars (\$500).

20 A person may not be cited more than once every twenty-four (24)
21 hours.

22 (d) Notwithstanding IC 34-28-5-5(c), civil penalties collected
23 under this section must be deposited in the Richard D. Doyle youth
24 tobacco education and enforcement fund established by
25 IC 7.1-6-2-6.

26 SECTION 16. [EFFECTIVE JULY 1, 2003] (a) Notwithstanding
27 IC 24-3-5-12(a), as added by this act, a tobacco manufacturer shall
28 file a certification under IC 24-3-5-12, as added by this act, not
29 later than August 15, 2003.

30 (b) Notwithstanding IC 24-3-5-13(a), as added by this act, the

1 **attorney general shall publish a directory under IC 24-3-5-13 not**
2 **later than October 1, 2003.**

3 **(c) This SECTION expires December 31, 2003."**

4 Renumber all SECTIONS consecutively.

(Reference is to HB 1788 as printed February 27, 2003.)

and when so amended that said bill do pass.

Committee Vote: Yeas 6, Nays 1.

Server

Chairperson